JUL 1 1955
HAROLD B. WILLEY, Clerk

No. 121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, *et al.*,

Appellants,

v.

ALFRED J. BOHLINGER, as Superintendent of INSURANCE OF THE STATE OF NEW YORK, INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

RALPH M. CARSON
15 Broad Street
New York, N. Y.

W. PERRY EPES
1600 Arch Street
Philadelphia, Penna.

Counsel for Appellees Insurance Company of North America and Philadelphia Fire and Marine Insurance Company.

INDEX

	PAGE
Motion to Dismiss or Affirm	1
Orders and Opinion below	2
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement	4
Argument	6
Conclusion	12
Appendix I	13
Appendix II	14

CITATIONS

Cases:

Associated Press v. *United States* 326 US 1	12
California State Auto Association Inter-Insurance Bureau v. *Maloney* 341 US 105	11
German Alliance Insurance Company v. *Hale* 219 US 307	7, 10, 11
Kiefer-Stewart Co. v. *Seagram & Sons* 340 US 211	8
Matter of Becker v. *Lunn* 200 App Div. 178	10
Matter of Blandford v. *McClellan* 173 Misc. 15	10
Matter of Stenstrom v. *Harnett* 131 Misc. 75, affd 224 App. Div. 127, affd 249 NY 606	10
People v. *Richards* 99 NY 620	10

PAGE

United States v. *Paramount Pictures* 334 US 131.. 12
United States v. *Real Estate Boards* 339 US 485.... 8
United States v. *Socony-Vacuum Oil Co.* 310 US 150 8
United States v. *South-Eastern Underwriters Association* 322 US 533 .....8, 9, 11
United States v. *Trenton Potteries Co.* 273 US 392.. 8

Statutes:

New York Insurance Law
Section 180(1) .....3, 4, 9, App I
181(5) 3
184(1) 3
184(3) .....3, 4, 9, App II
184(4) 3, 4, 7, 9

New York Education Law
Section 144 10

United States Constitution
14th Amendment 3, 7

Act of Congress
Public Law 15 of 1945, 79th Congress (15 USC §§ 1012 [b], 1013 [b]) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of NEW YORK FIRE INSURANCE RATING ORGANIZATION, *et al.*,

Appellants,

v.

ALFRED J. BOHLINGER, as Superintendent of INSURANCE OF THE STATE OF NEW YORK, INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Appellees.

No. 121

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Insurance Company of North America and Philadelphia Fire and Marine Insurance Company (herein called "appellees North America"), pursuant to Rule 16 of this Court, move that the appeals from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department of the State of New York, be dismissed, or that the final orders of those courts be affirmed, on the ground that the appeals do not present a substantial Federal question,

that the orders appealed from rest on an adequate non-Federal basis, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ORDERS AND OPINION BELOW

The decision of which appellants complain is reflected in an extensive and fully-considered opinion of the Deputy Superintendent of Insurance of the State of New York, adopted and approved by the Superintendent of Insurance on September 14 1945 (not reported but reproduced as App. A of Jurisdictional Statement).

The order of the Appellate Division First Department (App. C of Jurisdictional Statement), unanimously confirming that determination of the Superintendent of Insurance, was entered November 30 1954 and is reported at 284 App. Div. 963. The order of the Court of Appeals denying leave to appeal (App. D of Jurisdictional Statement) was entered January 13 1955 and is not yet reported. The order of the Court of Appeals dismissing the appeal as of right for lack of substantial constitutional questions (App. E of Jurisdictional Statement) was entered April 12 1955 and is reported at 308 NY 886.

The decision of the Superintendent treated the issues so thoroughly that neither the Appellate Division nor the Court of Appeals found an opinion necessary.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1257(2), the orders of the Court of Appeals and Appellate Division First Department, from which the appeals are taken, having been entered as stated above.

No constitutional question was raised by appellants in the proceedings before the Superintendent of Insurance,

and the opinion does not discuss any issues of constitutional law. In their petition to review the Superintendent's determination, appellants did note a constitutional objection as to two of 16 alleged errors, but the Appellate Division in unanimously confirming the Superintendent without opinion did not rule specifically upon those alleged constitutional errors and it is obvious from a reading of the Superintendent's opinion that it is based entirely upon local law having no constitutional implications. The Court of Appeals of the State expressly recognized this in dismissing appellants' appeal to that Court, on the Court's own motion, on the ground that "on this record, no substantial constitutional question has been presented" (308 NY 886).

QUESTION PRESENTED

Whether provisions of the New York Insurance Law permitting appellees North America to make fire insurance rates for dwellings independently of the concerted rate-making activity of appellant rating organization, on the basis in whole or in part of material required to be publicly filed by the rating organization with the Insurance Department, violate the due process clause of Section 1 of the 14th Amendment to the United States Constitution.

STATUTES INVOLVED

Sections 181(5), 184(1) and 184(4) of the New York Insurance Law are set forth in Appendices H, G and F, respectively, of the Jurisdictional Statement. Sections 180(1) and 184(3) of the Insurance Law are set forth in Appendices I and II hereto. These Sections are part of Article VIII of the Insurance Law, entitled "Rates and Rating Organizations". The determination of the Superintendent of Insurance was based, not upon Section

184(4) alone, as alleged by appellants, but rather upon a consideration of several related Sections of Article VIII including Sections 180(1) and 184(3).

STATEMENT

In the decision under review, the Superintendent of Insurance held (1) that the appellees North America had the right under the New York Insurance Law to withdraw their subscribership to the concerted rate-making activity of the appellant New York Fire Insurance Rating Organization for the dwelling classes of fire insurance and thus remain partial subscribers only, and (2) that appellees North America as partial subscribers had the right under the New York law to make an independent rate filing for the dwelling classes, on the basis of material required to be publicly filed with the Insurance Department by the rating organization.

Appellees North America are Pennsylvania corporations licensed to do business in New York (fols. 128-9*). The parent, Insurance Company of North America, was organized in 1792 and incorporated in 1794 as a capital stock fire and marine insurance company. In 1953 these companies wrote 2.6% of the total of all fire and allied lines of insurance written in New York State (this computation was made by us from material on record and publicly filed with the Superintendent of Insurance).

Appellant New York Fire Insurance Rating Organization is an incorporated association organized and licensed under the State Insurance Law to make fire insurance rates for its members and subscribers in the State of New York

*Folio references are to the printed record in the Appellate Division First Department, which has been certified and filed in the Office of the Clerk of this Court.

(fols. 116, 129, 194, 207, 342). The 50 appellant insurance companies are members of the rating organization engaged in the business of fire insurance in New York (fols. 195, 1085-1097). There are 128 other stock fire insurance companies which are members of the rating organization, and 81 insurance companies which are subscribers to its services (fols. 131, 342).

Members and subscribers of the rating organization write about 90% of the fire and allied lines of insurance in New York (fol. 209).

On December 7 1953 appellees North America notified the rating organization by letter that they thereby terminated as of March 1 1954 their subscribership to rating services for the dwelling classes of fire insurance (fols. 1549-1551). Such rating services included rates for fire, extended coverage, additional extended coverage, wind storm and hail, vandalism and malicious mischief and time element coverages.

On the same day appellees North America terminated their prior authorization to the Superintendent of Insurance to accept filings from the rating organization in their behalf for the dwelling classes (fols. 200, 1549-1551), and simultaneously filed with the Insurance Department rates, rules and forms for the dwelling classes substantially identical with those filed by the rating organization in behalf of its members and subscribers, with the request that such independent filing be approved for use on and after March 1 1954 (Exs. 19-29).

Upon the request of the rating organization, the Insurance Department held hearings February 25 and 26 and March 5 1954, and gave the parties full opportunity to elicit evidence. After receipt of briefs and long consideration the Deputy Superintendent rendered his opinion, which

was approved by the Superintendent on September 14 1954.

On September 30 1954 appellees North America filed independently with the Insurance Department new rates, rules and forms for the dwelling classes. These new rates were on the average approximately 10% below the rates for the same classes filed by the rating organization, and the new policies contained appropriate coverage and simplified forms. In accordance with the Insurance Law the Superintendent approved these independent filings on October 4 1954, to be effective October 20 1954.

Appellants on October 21 1954 obtained a temporary stay from Justice Breitel of the Appellate Division of the Supreme Court, First Department, preventing appellee North America from continuing use of its independent fire insuranec rates which had so become effective, and requiring appellee North America to raise its rates for dwelling insurance so as to be identical with those made by the rating organization. This stay was lifted on November 30 1954 by the entry of the Appellate Division's order unanimously confirming the decision of the Superintendent of Insurance. Appellants' further application for a stay was denied by Chief Judge Conway of the Court of Appeals on December 20 1954. A still further stay application of appellants was denied by the full Court of Appeals on January 13 1954. Finally on April 7 1955, Chief Judge Conway again refused a stay of appellees North America's independent rates requested by appellants in connection with the appeal on alleged constitutional grounds in the Court of Appeals.

ARGUMENT

Appellants' three notices of appeal to this Court and the Judisdictional Statement served June 1 1955 state no

question of Federal law of sufficient substance to be reviewed by this Court. The orders appealed from rest on an adequate non-Federal basis. The alleged constitutional issues raised by appellants are so entirely lacking in merit that they require no further argument.

Appellants contend that the Insurance Law of New York State offends the Federal Constitution in that it deprives the appellants of their property without due process of law. It is argued that the rating organization has a property right in the material which it uses to make and support its rate filings; that the Superintendent of Insurance applied New York law as permitting the North America Companies to use that material in making and supporting their independent filings; that no compensation for such use is provided for by statute, and it therefore unconstitutionally deprived appellants of their property.

I.

Appellants' contentions run directly counter to well-established principles of legitimate State regulation. Under the police power a State may, without violating the 14th Amendment, properly enact regulatory laws which permit and encourage independent rate-making, in order to prevent monopoly and promote competition in insurance rating. *German Alliance Insurance Company* v. *Hale* 219 US 307.

Section 184(4) and related provisions of the Insurance Law of New York are just such regulatory statutes. They are designed to preserve and facilitate independent competitive action on the part of those insurance companies which do not wish to join in the concerted rate-making activity of the appellant rating organization. The rating organization has a limited license under the New York regulatory statute to engage, on a voluntary basis, in price-fixing which would be illegal but for this license. Under the same law,

appellees North America have the right to make independent rates and may not be coerced into joining the price-fixing activities of the rating organization. As part of the regulatory scheme designed to preserve and facilitate independent competitive rates, and as a condition of legalizing the voluntary rate-fixing operations of the rating organization, the New York statute requires all rate filings and supporting information to be placed in the public domain for the use of all.

In *United States* v. *South-Eastern Underwriters Association* 322 US 533, the concerted rate-making activity of an organization almost identical to appellant rating organization was held to be illegal, in accordance with the long line of decisions holding illegal *per se* all price-fixing arrangements. *Kiefer-Stewart Co.* v. *Seagram & Sons* 340 US 211, 212; *United States* v. *Real Estate Boards* 339 US 485, 489; *United States* v. *Socony-Vacuum Oil Co.* 310 US 150, 218; *United States* v. *Trenton Potteries Co.* 273 US 392. Thereafter Congress by Public Law 15 declared that the Federal antitrust laws should govern the insurance business "to the extent that such business is not regulated by State law" (15 USC § 1012[b]), but that in no event should "boycott, coercion, or intimidation" be exempted (15 USC § 1013[b]).

As a result of these developments, in 1948 New York amended its Insurance Law so as to establish the regulatory plan now under review. This plan represents a balance between the legalization of voluntary rate-fixing, especially regulated and thereby exempted from the Federal antitrust laws, and the desire expressed in the Insurance Law to maintain reasonable competition. Appellant rating organization is but a creature of the Insurance Law and exists only by the combined grace of the Legislatures of the State of New York and the United States. Absent the enabling statutes of these bodies, the rating organization

is illegal. *United States* v. *South-Eastern Underwriters Association* 322 US 533. It should not be heard to complain, therefore, that the statute giving it life and breath conditions its continued existence on, among other things, placing in the public realm its rate filings with supporting information, and authorizing an insurer to file independent rates supported by the filings of the rating organization for the same classes of insurance.

The Superintendent of Insurance made it clear that his decision was based upon the finding that the purpose of the New York Legislature in enacting Section 184(4) and related provisions of the Insurance Law was to encourage and facilitate reasonable competition in insurance. (App. A, Jurisdictional Statement, pp. 50-54). He quoted Section 180(1) of the Insurance Law, which specifically provides that nothing in the rate regulatory law is intended to "prohibit or discourage reasonable competition" or "to prohibit or encourage . . . uniformity in insurance rates". He made it plain that authorizing independent rate filings, based in whole or in part on material of the rating organization and others, was part of the plan for facilitating price competition. He noted that Section 184(3) had been amended in 1948 so as to delete a prohibition against use of a rating organization's rate schedules or manuals by an independent insurer, and to provide specifically instead that uniformity is neither required nor prohibited (App. A, Jurisdictional Statement, pp. 42-3, 48). He likewise pointed to the amendment of Section 184(4) in 1948 which provided that a "filing and any supporting information shall be open to public inspection after the filing becomes effective" (App. A, Jurisdictional Statement, pp. 45, 48-9)*

*Under New York law, material filed and open to public inspection is public property and may be copied for any purpose. *People* v.

Tracing the history of these 1948 amendments to the New York Insurance Law (App. A, Jurisdictional Statement, pp. 50-54), the Superintendent concluded (p. 54):

> "As stated herein, my conclusions are dictated by the belief that the Congress of the United States and the New York Legislature intended that reasonable competition should exist in the fire insurance business. To my way of thinking the action of the North America Companies is reasonably calculated to achieve that and it is contemplated and permitted by our Insurance Law."

The New York statute here in question is precisely the type of regulation which was upheld in *German Alliance Insurance Co.* v. *Hale* 219 US 307. In that case, an Alabama statute regulating insurance permitted a policyholder to recover, in addition to actual loss, 25% of the amount of such actual loss, but only if the insurance company issuing the policy was a member of a rate-fixing organization. The additional 25% of actual loss could not be recovered from an insurance company which made its rates independently of a rating organization. The contention was made that this statute deprived insurance company members of rating organizations of their property without due process of law, and denied them equal protection of the laws, in violation of the 14th Amendment. This contention was rejected, and the statute upheld as a legitimate exercise of the State police power. This Court said (219 US at 316):

> "We can well understand that fire insurance companies, acting together, may have owners of property practically at their mer .y in the matter of rates, and may have it in their power to deprive the public

Richards 99 NY 620; *Matter of Blandford* v. *McClellan* 173 Misc. 15; *Matter of Becker* v. *Lunn* 200 App. Div. 178; *Matter of Stenstrom* v. *Harnett* 131 Misc. 75, *affd* 224 App. Div. 127, *affd* 249 NY 606; Education Law § 144.

> generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly."

The *German Alliance* case has been cited with approval recently by this Court both in the *South-Eastern Underwriters* case (322 US at 556) and in *California State Auto Association Inter-Insurance Bureau* v. *Maloney* 341 US 105, 109. The underlying principles are completely dispositive of these appeals.

II.

Even without the New York statutory requirements that the rating organization place its material in the public domain, appellants may not lawfully use their alleged property rights as they now urge to impose restrictions upon appellees North America's right and ability to compete.

Appellees North America smoked out this purpose of appellants by explicitly offering (without conceding liability) to make reparation by money payment in respect of the materials used by appellees for their filings (fols. 899-1152, 1184, 1186). Appellants rejected this offer both on the record (fols. 1159-1161) and through their brief in the Appellate Division. They made it clear in so doing that what they seek is not redress for an alleged appropriation of property, but the imposition of a restraint upon appellees North America's freedom of action. In their brief in the Appellate Division appellants said (p. 105):

> "The North America Companies cannot obtain any of the rating services of NYFIRO [the rating organization] merely by bargaining with respect to the alleged value of the rating services so desired; to obtain such services, they must become members or

subscribers of NYFIRO with respect to the rati service desired and agree to comply with the co ditions of its constitution and by-laws. The oblig tion to subscribe to and obey the conditions of t constitution and by-laws referred to in the statu cannot be evaded by the mere payment of a sum money. It is beyond the power of either NYFIR or the North America companies to bargain awa by private agreement the obligations placed upo them by statute."

Such concerted refusal to sell to non-members of a association on the basis of alleged copyright, even whe such a right exists, has been held to be an illegal "hamperin of business rivals" under the Federal antitrust laws. *Asso ciated Press* v. *United States* 326 US 1, 15. Refusal t sell even copyrighted material except upon condition tha uniform prices be maintained, is a violation of the Sherma Act. *United States* v. *Paramount Pictures* 334 US 131 142-3.

CONCLUSION

This record fails to present any substantial Federal question, and the matters dispositive of the decisions below need no further argument. This Court should either dismiss these appeals or affirm the determination below.

June 30 1955

Respectfully submitted,

RALPH M. CARSON
15 Broad St.
New York, N. Y.

W. PERRY EPES
1600 Arch Street
Philadelphia, Penna.

APPENDIX I

Section 180(1) of New York Insurance Law

"The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, unfairly discriminatory or otherwise unreasonable and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section."

APPENDIX II

Section 184(3) of New York Insurance Law

"Nothing herein contained shall be construed as requiring any insurer to become a member of or subscriber to any rating organization. Except to the extent necessary to meet the provisions of paragraphs (b) and (c) of subsection one of section one hundred eighty-three, uniformity among insurers in any matters within the scope of sections one hundred eighty-three and one hundred eighty-four is neither required nor prohibited."

Office - Supreme Court, U.S.
FILED
JUL 1 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

NO. 121, OCTOBER TERM, 1955

CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, *et al.*,

Appellants,

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

On Appeal from the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, of the State of New York

MOTION TO DISMISS OR AFFIRM

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for Appellee
Superintendent of Insurance
of the State of New York
80 Centre Street
New York 13, N. Y.

JAMES O. MOORE, JR.
Solicitor General

SAMUEL A. HIRSHOWITZ
DANIEL M. COHEN
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Motion	1
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement	3
Argument	7
Conclusion	8

CITATIONS

Cases:

German Alliance Insurance Company v. Hale, 219 U. S. 307	7
Nebbia v. New York, 291 U. S. 502	7
United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533	7

Statutes:

New York Insurance Law,	
Section 180(1)	3, 7
181(5)	3
184(1)	3, 7
184(3)	3
184(4)	3, 5, 7
New York General Business Law, § 340	7
Public Law 15 of 1945 (79th Congress)	7
28 U. S. C. 1257	2

Constitution:

14th Amendment	3

Supreme Court of the United States

No. 121, October Term, 1955

Charles P. Cullen, as Treasurer of New York Fire Insurance Rating Organization, *et al.*,

Appellants,

vs.

Alfred J. Bohlinger, as Superintendent of Insurance of the State of New York, Insurance Company of North America and Philadelphia Fire and Marine Insurance Company,

Appellees.

On Appeal from the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, of the State of New York

---

MOTION TO DISMISS OR AFFIRM

The appellee Superintendent of Insurance of the State of New York (herein called "appellee Superintendent"), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeals taken herein from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department, be dismissed or, in the alternative, that the final orders of the courts below be affirmed.

Opinions Below

No opinions were written by the New York Courts in this proceeding to review a determination of the Superintendent.* A memorandum decision of the New York Court of Appeals, which upon the Court's own motion dismissed the appeal taken to that Court as a matter of right by reason of the lack of any substantial constitutional question, is reported in 308 N. Y. 886. (See Appendix E of Jurisdictional Statement). The Court of Appeals had previously denied the appellants' motion for leave to appeal. The New York Appellate Division had unanimously confirmed, without opinion, the determination of the Superintendent in a decision reported at 284 App. Div. 963.

The determination of the Superintendent of Insurance is not reported. But it is set out at length in Appendix A of the Jurisdictional Statement.

Jurisdiction

Jurisdiction is invoked under 28 U. S. C., 1257 (2). But it has not been shown that the New York Courts deemed it necessary to pass upon the constitutionality of any of the provisions of the New York Insurance Law. The Appellate Division wrote no opinion in confirming the Superintendent's determination, which was attacked in appellants' petition on sixteen grounds, only two of which related to constitutionality. And the Court of Appeals, in dismissing appellants' appeal to it, did so expressly "upon the ground that on this record, no substantial constitutional question has been presented" (308 N. Y. 886; App. E, p. 63).

---

* Leffert Holz was appointed to the office of Superintendent of Insurance in February, 1955, succeeding the originally named appellee, Bohlinger.

Question Presented

The question which appellants seek to present is whether Section 184 (4) of the New York Insurance Law, permitting appellees North America to file fire insurance rates on dwellings independently of the concerted ratemaking activity of the appellant rating organization, wholly or partly on the basis of material required to be filed publicly with the Insurance Department, violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes Involved

Section 184 (4) of the Insurance Law of the State of New York, as well as Sections 184 (1) and 181 (5), are set forth in Appendices F, G and H of the Jurisdictional Statement. Other pertinent sections of the Insurance Law, relied on by the Superintendent, are set forth in his decision. See especially Sections 180 (1) and 184 (3). (Jur. Statement, pp. 39 and 42; and Appendix to Motion of Appellees "North America" to dismiss or affirm).

Statement

This is an appeal from (1) an order entered on November 30, 1954 by the Appellate Division of the Supreme Court, First Department, of the State of New York, unanimously confirming without opinion a determination of the Superintendent of Insurance of New York; (2) an order entered on January 13, 1955 by the Court of Appeals of New York, denying appellants leave to appeal from the order of the Appellate Division, and (3) an order entered on April 12, 1955 by the Court of Appeals of New York, dismissing on its own motion, on the ground that "no substantial constitutional question has been presented"

appellants' appeal as of right on alleged constitutional grounds.

In brief, the Superintendent of Insurance held (1) that the appellees North America had the right under the New York Insurance Law to withdraw from the concerted rate-making activity of the appellant New York Fire Insurance Rating Organization for the dwelling classes of fire insurance and thus remain only partial subscribers to such rating organization, and (2) that appellees North America as partial subscribers had the right under the New York law to make an independent rate filing for the dwelling classes and (3) that the filing of those appellees could be supported on the basis of material required to be publicly filed with the Insurance Department by the rating organization.

Appellant New York Fire Insurance Rating Organization is an incorporated association organized and licensed under the State Insurance Law to make fire insurance rates for its members and subscribers in the State of New York (fols. 116, 129, 194, 207, 342).* The fifty appellant insurance companies are members of the rating organization engaged in the business of fire insurance in New York (fols. 195, 1085-1097). There are 128 other stock fire insurance companies which are members of the rating organization, and 81 insurance companies which are subscribers to its services (fols. 131, 342).

Members and subscribers of the rating organization write about 90% of the fire and allied line insurance premium volume in New York (fol. 209).

In carrying out its basic price-fixing function, the rating organization compiles certain information as to fire protection facilities and hazards which is useful in the making of fire insurance rates. This material is described in the

---

* Folio references are to the printed record in the Appellate Division.

decision of the Superintendent (App. A of Jurisdictional Statement, pp. 28-29, 31).

Appellees North America are Pennsylvania corporations licensed to do business in New York (fols. 128-129). The parent, Insurance Company of North America, was organized in 1792 and incorporated in 1794 as a capital stock fire and marine insurance company.

On December 7, 1953 appellees North America notified the rating organization by letter that they thereby terminated their subscribership to rating services for the dwelling classes of fire insurance, effective March 1, 1954 (fols. 1549-1551). Such rating services included rates for fire, extended coverage, additional extended coverage, wind storm and hail, vandalism and malicious mischief and time element coverages.

On the same day (December 7, 1953) appellees North America terminated their prior authorization to the Superintendent of Insurance to accept filings from the rating organization in their behalf for the dwelling classes (fols. 200, 1549-1551), and simultaneously filed with the Department of Insurance rates and schedules for the dwelling classes substantially identical with those filed by the rating organization in behalf of its members and subscribers, with the request that such independent filing be approved for use on and after March 1, 1954 (Exs. 19-29). The Superintendent took no action and this independent filing was deemed approved by operation of law under Section 184 (4) of the Insurance Law which provides that a filing not disapproved during a waiting period of fifteen days or any extension thereof shall be deemed approved (fol. 201).

Upon the request of the rating organization, the Insurance Department held hearings on February 25 and 26 and March 5, 1954 and the parties were given full opportunity to elicit evidence. After receipt of briefs and long consideration, a Deputy Superintendent rendered an opinion,

which was adopted and approved by the Superintendent on September 14, 1954.

On September 30, 1954, appellees North America filed independently with the Insurance Department new rates and schedules for the dwelling classes. These new rates were on the average approximately 10% below the rates for the same classes filed by the rating organization, and the new policies contained appropriate coverage and simplified forms. In accordance with the Insurance Law, the Superintendent approved these independent filings on October 4, 1954, to be effective October 20, 1954.

Appellants applied for and on October 21, 1954 obtained a temporary stay from Justice Breitel of the Appellate Division of the Supreme Court, First Department, preventing appellee North America from continuing use of its independent fire insurance rates which became effective on October 20, 1954, and requiring appellee North America to raise its rates for dwelling insurance to be identical with those made by the rating organization. This stay was lifted on November 30, 1954 by the entry of the Appellate Division's order unanimously confirming the decision of the Superintendent of Insurance. Appellants' further application for a stay was denied by Chief Judge Conway of the Court of Appeals on December 20, 1954. A still further stay application made by the appellants was denied by the full Court of Appeals on January 13, 1954. Finally, on April 7, 1955, Chief Judge Conway again refused a stay of appellees North America's independent rates requested by appellants in connection with the appeal on alleged constitutional grounds in the Court of Appeals.

It should be noted, however, that in the instant matter, only the Superintendent's determination of September 14, 1954 was before the courts for review.

ARGUMENT

No substantial federal question is presented by these connected appeals.

New York, following this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, and the enactment of Public Law 15 of 1945 (79th Congress) amended Article VIII of its Insurance Law to encourage and facilitate reasonable competition in the fire and casualty insurance businesses. New York's policy is expressed in Section 180 (1) of the Insurance Law, which states that nothing in Article VIII of the law is intended "to prohibit or discourage reasonable competition." New York also amended its Anti-Monopoly Act (Gen. Bus. Law, § 340), specifically to cover the business of insurance to the extent it was not regulated by Article VIII of the Insurance Law.

Moreover, as a matter of police power and to aid the Superintendent in the exercise of his supervisory powers, it was provided that rating organizations and insurers should *publicly* file the data upon which their filed rates were based. Insurance Law, Section 184 (1); 184 (4); *Nebbia* v. *New York,* 291 U. S. 502; *German Alliance Insurance Company* v. *Hale,* 219 U. S. 307. All insurers who wished to compete for business and to file rates and any data deemed proper by them or necessary by the Superintendent take the risk, by filing, that when their rates become effective their filed data will become publicly known and will thereafter be available as a factor to be considered in connection with other proposed filings.

The appellants' grievance against the appellees North America, by reason of North America's withdrawal from their rating organization and the appellees' subsequent use of the organization's data, may provide the basis for some private right of action for breach of contract

or unfair competition, as the Superintendent observed (App. A, p. 40). But whatever damages or injunctive relief might be predicated upon appellants' private contract or "property" rights against the insurance company, appellees, there seems to be no basis for considering on this appeal any claim that either the Superintendent's action or that New York's legislation designed to prevent illegal restraints upon competition is unconstitutional. Except for the statute, the rating organization's concerted activities would have been illegal and could have been totally prohibited. Public Law 15 of 1945; *United States v. South-Eastern Underwriters Association* (*supra*).

Conclusion

Since no substantial federal question is presented, this Court should dismiss the appeals or affirm the determinations below.

Dated, New York, June 29, 1955.

Respectfully submitted,

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for Appellee
Superintendent of Insurance
of the State of New York

JAMES O. MOORE, JR.
Solicitor General

SAMUEL A. HIRSHOWITZ
DANIEL M. COHEN
Assistant Attorneys General
of Counsel

Office - Supreme Court, U.
FILED
JUL 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 121

CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, AGRICULTURAL INSURANCE COMPANY, *et al.*,

Appellants,

vs.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

SAMUEL A. BERGER,
Attorney for Appellants,
Office & P. O. Address,
90 John Street,
Borough of Manhattan,
New York 38, New York.

TABLE OF CONTENTS

	PAGE
BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM	1-15
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	4
ARGUMENT	5
I.	6
II.	8
III.	12
CONCLUSION	15

CASES CITED:

California State Auto Association Inter-Insurance Bureau v. Maloney, 341 U. S. 105 (1951)	13
Frost v. Railroad Commission of State of California, 271 U. S. 583 (1926)	13
German Alliance Insurance Company v. Hale, 219 U. S. 307 (1911)	12
Importers & Exporters Insurance Company v. Rhoades, Matter of, 239 N. Y. 420 (1925)	5

PAGE

International Steel & Iron Company v. National Surety Company, 297 U. S. 657 (1936) 2

Louisville & Nashville Railroad v. Central Stockyards Company, 212 U. S. 132 (1909) 14

Smith v. Cahoon, 283 U. S. 553 (1931) 13

Underwriters Survey Bureau, Ltd. v. American Home Fire Assurance Co. [1939] 4 D. L. R. 89 7

Underwriters Survey Bureau, Ltd. v. Massie & Renwick, Limited [1940] 1 D. L. R. 625, S. C. R. 218, affirming [1938] 2 D. L. R. 31, Ex. C. R. 103 7

United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944) 5, 12

CONSTITUTION CITED:

CONSTITUTION OF THE UNITED STATES:

14th Amendment 7, 13

RULE OF COURT CITED:

Rule 16 1

STATUTES CITED:

New York Anti-Monopoly Act (General Business Law), Section 340 5

NEW YORK INSURANCE LAW:

Article 8 4

Section 180(1) 4, 5, 13

Section 181(5) 3, 9

PAGE

Section 184(1) ____ 3

Section 184(3) ____ 4

Section 184(4) ____ 3, 7

PUBLIC LAW 15 (15 U. S. C.):

Sections 1011-1015 ____ 5

Section 1012[b] ____ 5

TEXTS CITED:

New York State Assembly Document 1911 No. 30, Report of the Merritt Committee, 1943 Reprint, pages 124-5 ____ 13

New York State Legislative Document 1948 No. 46, Report of the Joint Legislative Committee on Insurance Rates and Regulation, page 37 ____ 12

Reprint of Government's Brief in United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944) ____ 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 121

CHARLES P. CULLEN, as Treasurer of New York Fire Insurance Rating Organization, AGRICULTURAL INSURANCE COMPANY, *et al.*,

Appellants,

VS.

ALFRED J. BOHLINGER, as Superintendent of Insurance of the State of New York, INSURANCE COMPANY OF NORTH AMERICA and PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellants submit this brief in opposition to the Motions to Dismiss or Affirm being made separately by the appellees, Insurance Company of North America and Philadelphia Fire and Marine Insurance Company, and by appellee Superintendent of Insurance of the State of New York, both pursuant to Rule 16 of this Court, and both received by

the attorney for appellants on June 30, 1955. The motion by the appellee companies is being made on the ground that the appeals herein from final orders of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department, of the State of New York, do not present a substantial federal question, that the orders appealed from rest on an adequate non-federal basis, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The motion by the appellee Superintendent of Insurance is made on the ground that the appeals do not present a substantial federal question.

JURISDICTION

The Court is respectfully referred to the section of appellants' Jurisdictional Statement entitled "Grounds on which Jurisdiction Is Involved", for a clear statement of the jurisdictional basis of this appeal. As the Appellants have already pointed out, they raised the constitutional issue in their petition for review of the appellee Superintendent's determination, as soon as the issues came into being, which was via that determination. (See *International Steel & Iron Company* v. *National Surety Company*, 297 U. S. 657 (1936)).

As a result of the determination by the appellee Superintendent, as approved by the New York courts, furthermore, it is impossible to avoid this constitutional question. No one denies that the appellants have a valuable property right in their rating system. There is a clear holding by the courts below, furthermore, that the statute permits the appropriation of the property in question. For so holding, the Superintendent apologetically remarked in his

determination: "It is not easy for anyone who respects property rights to conclude that they can be rightfully appropriated without the consent of the owner, especially a competitor." (See "Appendix A" of Jurisdictional Statement, at page 50). Counsel for the appellee companies, moreover, admit that this holding was the basis of the Superintendent's decision. At page 9 of appellee companies' Motion to Dismiss or Affirm, they say the following:

> "He made it plain that authorizing independent rate filings, based in whole or in part on material of the rating organization and others, was part of the plan for facilitating price competition."

The New York Court of Appeals, in dismissing appellant's appeal, as of right, moreover, taken in pursuance of the constitutional issues only, on the ground that the record presents no substantial constitutional question, adjudicated the merits of the constitutional issue now before this Court. (See cases cited at pp. 12 and 13 of the Jurisdictional Statement.)

QUESTION PRESENTED

As pointed out in the Jurisdictional Statement the appeals included herein comprise one case with one question and will be treated as such. The question presented is set out at pages 5-6 of the Jurisdictional Statement.

STATUTES INVOLVED

Sections 181(5), 184(1) and 184(4) of the New York Insurance Law are set forth in Appendices H, G and F, respectively, of the Jurisdictional Statement. Sections

180(1) and 184(3) of the Insurance Law are set forth in Appendices I and II attached to appellee companies' Motion to Dismiss or Affirm. These Sections are part of Article 8 of the Insurance Law, entitled "Rates and Rating Organizations". The sections which the appellee companies are attempting to make part of this appeal, although not necessary to the appellee Superintendent's determination, do not change in any respect the issues before this Court. None of the sections above referred to provides the necessary machinery or other guarantees for compensation to the appellants.

STATEMENT

We respectfully refer the Court to the section entitled "Statement of the Case", at pages 6-10 of the Jurisdictional Statement.

The following salient facts should be noted: the complexity, vastness and costliness of the appellant New York Fire Insurance Rating Organization's (hereinafter called NYFIRO) rating system; little of the material produced by NYFIRO is filed with the New York Insurance Department; the admission by the appellee companies that their filing was obtained by them as subscribers "from material furnished to us by the rating organization" and that as of December 7, 1953, the appellee companies' filing was identical with that which NYFIRO had made (pp. 234 and 228 of the printed "Record On Proceeding" before the Appellate Division); and that the appellee companies must continue to use NYFIRO's system in order to maintain the validity of their own filing.

It should also be noted that concerted rate making has always been a vital element of the Fire Insurance Industry

in New York State and that no intention to prohibit it was behind the 1948 Amendments to the New York Insurance Law. (*Matter of Importers & Exporters Insurance Company* v. *Rhoades,* 239 N. Y. 420 (1925); and Section 180 (1), New York Insurance Law, "Appendix I" of appellee companies' Motion.) As a matter of fact, the preamble section to the rating article of the New York Insurance Law declares that one purpose of the article is "to authorize and regulate cooperative action among insurers in rate making." (Section 180(1), New York Insurance Law, "Appendix I" of appellee companies' Motion.)

ARGUMENT

Any discussion of the issues herein must begin with the fact that NYFIRO is a duly authorized and legal entity, entitled to all the rights and privileges our Constitution and laws afford to all forms of business organization and human activity. The allusions in the arguments of appellees to *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533 (1944); to Public Law 15 (15 U. S. C. Sections 1011-1015); to federal anti-trust laws, and cases decided thereunder (see cases at pages 8, 9, and 12 of appellee companies' Motion); and to the New York Anti-Monopoly Act (General Business Law, Section 340), are completely extraneous to the case at hand.

Federal anti-trust legislation is not applicable here. (See 15 U. S. C., Section 1012 [b].) There is no question here, furthermore, of the legality or propriety of NYFIRO's activities, as a rate-promulgating organization, under the New York Insurance Law or otherwise. Section 180(1) of the Insurance Law explicitly states, in fact, that one

of the purposes of the rating article is to authorize cooperative action among insurance companies. NYFIRO is exercising a lawful function, pursuant to the requirements of the Insurance Law, and under the supervision of the Superintendent of Insurance of the State of New York. The appellee companies have the right to become subscribers, without any restrictions, on the same basis as all other subscribers to NYFIRO's services (see Article V, Pl. Ex. 6, R. 175, 491).* By appropriating the property of NYFIRO, over its objection, and under circumstances amounting to confiscation, the New York Insurance Law and the appellee companies have deprived, and are depriving, NYFIRO of property, without due process of law, in violation of the Federal Constitution.

I.

Because a state gives a corporation the very right of existence, it cannot legally confiscate its property and give it to competitors. NYFIRO stands in the same legal shoes as a state-created corporation. The issue then, is one embracing the destruction of a basic property right of an established legal entity, under the guise of "state regulation."

In formulating a plan to allow independent insurers to operate in New York, the New York State Legislature, and appellee Superintendent of Insurance made one constitutionally vulnerable error which is now before this Court for rectification. Appellants are not before this Court to

---

* Record page references are to the printed "Record on Proceeding" in the Appellate Division, First Department, which has been certified and filed in the Office of the Clerk of this Court.

contest principles of rate uniformity or partial subscribership. Appellants are here to point out, simply, but emphatically, that in permitting the appellee companies to expropriate highly valuable rating materials and to attach themselves parasitically to NYFIRO's intricate rating mechanism, without provision in the law for guaranteeing payment to appellants, Section 184(4) of the New York Insurance Law deprives appellants of their property, without due process of law, under the 14th Amendment to the Constitution of the United States.

The way the statute in question now stands, any company may use all NYFIRO services and materials, without payment and with impunity. This fact carries national significance, most states having adopted statutes embodying provisions similar to the provisions involved in these appeals. What the appellee insurance companies have done in New York was attempted in Canada by other companies, but the Supreme Court of Canada defeated the attempt at such an appropriation by competing companies (*Underwriters Survey Bureau, Ltd.* v. *Massie & Renwick, Limited* [1940] 1 D. L. R. 625, S. C. R. 218, affirming [1938] 2 D. L. R. 31, Ex. C. R. 103; and *Underwriters Survey Bureau, Ltd.* v. *American Home Fire Assurance Co.* [1939] 4 D. L. R. 89).

Other companies have jumped on the bandwagon for a free ride, at the expense of their competitors. The rating system, which is the subject of these appeals, is valued at over $20,000,000.00 (R. 221, and Jurisdictional Statement "Appendix A", p. 31), and costs over $2,100,000.00 a year to operate and maintain (R. 182, and Jurisdictional Statement, "Appendix A", page 31). Without constant

revision, the system and materials would lose their validity as a rating mechanism. Broaden the horizon to encompass almost all of the nation, and the problem makes for a major upheaval in the insurance industry—without orderly procedure and without constitutional protection.

It is true that the appellee companies offered to pay for NYFIRO services (at the Administrative Hearing—before the constitutional issue came into the picture) but there is no guarantee written into the law, that such payments always would be forthcoming or adequate.* Without such provisions, the law is unconstitutional.

II.

The footnote reference of appellees to local law relating to materials open to public inspection (see pp. 9-10 of appellee companies' Motion) overlooks a number of important factors not covered by the cases cited therein. There was never a claim in any of those cases that anyone no less a competitor had any property right in the documents on file—nor was there any claim that a constitutional right was violated.

It is significant moreover that relatively little of the material produced by the Rating Organization is filed with the Insurance Department. Only that which is necessary to comply with the requirements of the Insurance Law is

---

* What appellants argued in their brief before the Appellate Division in regard to payment (see page 11, appellee companies' Motion), was intended to persuade that Court, that the interpretation given the rating statute, generally, by the Superintendent of Insurance, was erroneous; that statement was devoted to other issues, furthermore, and has no bearing on the issue, as it stands before this Court.

submitted, while the great amount of statistical data which forms the basis of the filings and the basis of the manuals loaned to the members and subscribers is never even deposited with the Insurance Department (R. 207, 209-17). These include such materials as detailed surveys of cities and towns (R. 207); reports of inspection of buildings, water systems and fire fighting facilities, etc. (R. 374); numerous individual property surveys, such as inspections made of specifically rated properties in congested areas, inspections made of fire resistive dwellings, inspections made to determine whether property has been converted from a business use to a dwelling use, and maps which indicate the risks within given areas (R. 212-17). Many forms and much other data including rate cards are delivered to the members and subscribers, but not submitted to the Insurance Department (R. 220-1, 410).

It is to be observed, furthermore, that by the provisions of Section 181, subdivision (5) of the New York Insurance Law, only a person "upon whose property or risk a rate applicable thereto has been made" has a right to demand "pertinent information as to such rate and a copy of the schedule, if any, as applied to such property or risk." Moreover, he is required to pay a fee for such information.

All of these factors make it clear that this question could not have been decided on the basis of the cases cited. This case could not have been decided on the basis of local law once it was agreed upon that appellants have a property right in their rating system. This has never been denied (See cases cited in Jurisdictional Statement, pp. 14-17). Rather it has been the contention of appellees all along, and it was the holding of the appellee Superintendent, that it is in face of the property right held by

appellants in their rating system, that the state can legislate permission to competitors to expropriate the system for their own purposes, in competition with appellants (See briefs in Appellate Division of appellee companies, at pp. 26-9, and of appellee Superintendent, at pp. 21-7; and briefs in Court of Appeals in Opposition to Motion for Leave to Appeal, of appellee companies, at pp. 5-7, and of appellee Superintendent, at pp 2-3).

Appellee companies also make the following statement in their Motion, at page 9:

> "It [NYFIRO] should not be heard to complain, therefore, that the statute giving it life and breath conditions its continued existence on, among other things, placing in the public realm its rate filings with supporting information, and authorizing an insurer to file independent rates supported by the *filings* of the rating organization for the same classes of insurance." (Emphasis added)

What the appellee companies expropriated was not limited to the filings of NYFIRO. It was, and is, the entire work product of NYFIRO, consisting of matter filed and matter not filed, and daily changes in the rating operations, which are not reflected in the appellee companies' filings. Uncontested testimony on this subject, was given by H. Sumner Stanley, General Manager of NYFIRO (R. 408-10).

There were changes in NYFIRO's system between March 1st and 5th, 1954; nine changes in classifications of towns; four changes in boundaries of fire protection districts; twenty-six publications of dwelling rates; two average blanket rates (R. 408). None of these changes is reflected in the appellee companies' filings (R. 408).

On the other hand, the appellee companies' letter to agents, of March 1, 1954, points out in underscoring, that *"North America's [appellee companies'] direct filings are identical with those presently effective"* (Def. Ex. D; R. 416, 640). This not only is incorrect, but also, is the appellee companies' means of directing their agents to use NYFIRO's rate cards (R. 414). By this means, the appellee companies attempt to make use of the daily changes serviced by NYFIRO (R. 415). NYFIRO has not granted permission to the appellee companies to use its town classifications for the classes of risks involved in this case (R. 429); or its exposure schedule on these classes (R. 430); or any of its data or material in connection with these classes.

While the appellee companies have made a so-called independent filing, they have made no independent promulgation of rates, pursuant thereto (R. 414-15). They have not, and cannot, moreover, pick up for filing, the constant daily changes in the NYFIRO system. As indicated, their agents, pursuant to their instructions, are not using rates in accordance with their filing, but are using rates of NYFIRO, which reflect the daily changes in the rating plan, not shown in the appellee filings (R. 409-10). The appellee companies have, in effect, directed their agents to use the rates, rules and forms of NYFIRO. By this method, the appellee companies expropriated the work product of NYFIRO, as that work product changed from day to day, and still are expropriating it, without the consent of, and without being required by law to make payment to NYFIRO.

III.

Appellees rely heavily on the case of *German Alliance Insurance Company* v. *Hale*, 219 U. S. 307 (1911) to support their argument, that the question at bar lacks substance. Clearly, this 1911 case, which began even earlier, arose under recognizably different circumstances. The purpose of the legislation in that case was to destroy all vestiges of combination; to prevent all concerted rate-making; and to do so, without any regulatory institutions. For those purposes, in those times, under those circumstances, the statute employed reasonable means to effect the object of legislation.

Between 1885 and 1912, twenty-three states enacted laws, forbidding insurance combinations, which significantly manifested the climate of opinion during that period. (Reprint of Government's Brief, in *United States* v. *South-Eastern Underwriters Association, supra,* at pp. 80 and 82.) Not until a later time, were some of those anti-trust laws superseded by legislation, which authorized collective activities by fire insurance companies. (See Government Brief, *supra,* at pp. 82-3.)

"There were no rating laws in New York State prior to 1911. Rates were unregulated. Rating organizations likewise were not regulated. However, their existence was not prohibited as was the case in some states, where anti-compact laws were in force." (New York State Legislative Document 1948 No. 46, *Report of the Joint Legislative Committee on Insurance Rates and Regulation,* at p. 37.)

The 1911 New York State Legislative Committee, known as the Merritt Committee, after thoroughly investigating and discussing the problem, recommended as follows:

> "As to the so-called anti-compact law: for the many reasons given, your Committee believes that it would be most unfortunate for the public if a condition of open competition in rates were forced by the State. The safe policy to follow in treating this subject is to recognize the good which flows from combination well regulated; to permit the companies to use rating associations and bureaus to develop the principle of schedule rating and to spread the cost of determining proper rates among the companies, and to permit them to agree to maintain those rates." (New York State Assembly Document 1911 No. 30, *Report of the Merritt Committee,* 1943 Reprint, at pages 124-5.)

Thus it is seen that New York State does not want to prevent cooperative action; rather, its purpose is to authorize and regulate it. (Section 180 (1), New York Insurance Law, appellee companies' Motion, "Appendix I".) But in so doing, it has gone beyond the established principles of reasonable regulation, resulting in the confiscation of property, without compensation, in violation of the 14th Amendment. (See cases cited at pp. 17 and 18 of the Jurisdictional Statement; see, also, *Frost* v. *Railroad Commission of State of California,* 271 U. S. 583 (1926); *Smith* v. *Cahoon,* 283 U. S. 553 (1931); and cases cited therein, drawing the distinction between complete prohibition of an activity, and permitting it, but imposing unconstitutional conditions upon its existence.)

The case of *California State Auto Association Inter-Insurance Bureau* v. *Maloney,* 341 U. S. 105 (1951), is just as meaningless for the case at bar, in the light of the following statement of the Court, at page 108:

> "We were advised on the argument that the premiums chargeable can be commensurate with the greater risks of the new business. Confiscation is therefore not a factor in the case."

Under the Section of the New York Insurance Law here in issue, appellants have no right to charge anything for the use of their property, nor in any other way to protect it from the grasping hands of competitors. Appellants must pay for the rating system, but competitors like the appellee companies, need not. Confiscation, therefore, is a factor in *this* case.

Perhaps it is true, as Justice Holmes observed in *Louisville & Nashville Railroad* v. *Central Stockyards Company*, 212 U. S. 132 (1909) that a valid law could have been enacted for the same purpose, but that could not save the law which was enacted without guarantees of compensation. Here, the same goal—permitting independent insurers to use NYFIRO's property and services—could have been accomplished in a constitutional manner, merely by inserting the proper guarantees of payment in the controlling law. But the fact is this was not done. And no amount of legalistic rhetoric can correct that fatal error.

CONCLUSION

Both motions to dismiss or affirm, one by the appellee companies and the other by the appellee Superintendent of Insurance, should be denied.

July 15, 1955.

Respectfully submitted,

SAMUEL A. BERGER,
Attorney for Appellants,
Office & P. O. Address,
90 John Street,
Borough of Manhattan,
New York 38, New York.